

HAYES H. GABLE, III, SBN #60368  
Attorney at Law  
428 J. Street, Suite 354  
Sacramento, CA 95814-2328  
(916) 446-3331  
(916) 447-2988 (Fax)  
hhgable@pacbell.net

THOMAS A. PURTELL, SBN #26606  
Attorney at Law  
430 Third Street  
Woodland, CA 95695  
(530) 662-1940

Attorneys for Defendant  
MARCO ANTONIO TOPETE

**FILED**  
YOLO SUPERIOR COURT

FEB 11 2010

By

*C. Garrett*  
Deputy

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF YOLO

THE PEOPLE OF THE STATE OF  
CALIFORNIA,  
vs.  
MARCO ANTONIO TOPETE,  
Defendant.

Case No.: 08-3355

**NOTICE OF MOTION AND MOTION TO  
EXCLUDE DEFENDANT'S POST  
ARREST STATEMENTS**

Date: : March 12, 2009  
Time: 8:30 a.m.  
Dept: 6

**TO: THE ABOVE-ENTITLED COURT AND THE DISTRICT ATTORNEY:**

**NOTICE IS HEREBY GIVEN** that on the date and time indicated above, or on such date as the matter may be heard, Defendant MARCO TOPETE, by and through his attorneys Hayes H. Gable III and Thomas A. Purtell, will move that the Court order the exclusion of defendant's post arrest statements. This motion is based on this notice, the pleadings, records, and files in this action, the Memorandum of Points and Authorities served and filed herewith, and upon such oral and documentary evidence as may be presented at the hearing.


//

1 Dated: February 11, 2010

Respectfully submitted,

3 HAYES H. GABLE III  
4 THOMAS A. PURTELL

5 By:

  
6 HAYES H. GABLE III  
7 Attorney for the Defendant  
8 MARCO ANTONIO TOPETE  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 HAYES H. GABLE, III, SBN #60368  
2 Attorney at Law  
3 428 J. Street, Suite 354  
4 Sacramento, CA 95814-2328  
5 (916) 446-3331  
6 (916) 447-2988 (Fax)  
7 hhgable@pacbell.net

8 THOMAS A. PURTELL, SBN #26606  
9 Attorney at Law  
10 430 Third Street  
11 Woodland, CA 95695  
12 (530) 662-1940

13 Attorneys for Defendant  
14 MARCO ANTONIO TOPETE

15 SUPERIOR COURT OF CALIFORNIA  
16 COUNTY OF YOLO

17 THE PEOPLE OF THE STATE OF  
18 CALIFORNIA,  
19 vs.  
20 MARCO ANTONIO TOPETE,  
21 Defendant.

Case No.: 08-3355

NOTICE OF MOTION AND MOTION TO  
EXCLUDE DEFENDANT'S POST ARREST  
STATEMENTS

Date: March 12, 2009  
Time: 8:30 a.m.  
Dept: 6

22 INTRODUCTION

23 The defendant, Marco Topete, was interviewed on July 16, 2008, for six hours. In  
24 that time, he invoked his right to remain silent at least six, but perhaps as many as eleven, times.  
25 He also invoked his right to have an attorney present. Rather than respecting his *Miranda* rights,  
26 Detectives Jimenez and Cordova and Parole Agent Modesto all badgered him and leveraged his  
27 concern for his daughter's placement with CPS to compel him to answer questions. Confessions  
28 obtained by threat or promise are involuntary and must be excluded. Therefore, the entire

1 statement ought to be suppressed, as it was obtained in flagrant violation of *Miranda* and its  
2 progeny.

### 3 STATEMENT OF FACTS

4 Mr. Topete was arrested and brought to an interview room at 9:28 a.m. on June 16, 2008,  
5 for questioning. After being Mirandized by Deputy Ray Jimenez, (Tr. 1:8-14),<sup>1</sup> Mr. Topete  
6 answered a few booking questions. As the questioning veered toward the incident surrounding  
7 the death of Deputy Diaz, Mr. Topete stated that he couldn't answer any questions. (Tr. 4:16-17.)  
8 Jimenez then confirmed Mr. Topete didn't want to talk and asked his age. (Tr. 4:18.) He went on  
9 to ask about Mr. Topete's children, but as his line of questioning returned to Mr. Topete's  
10 reasons for running from the police, Mr. Topete once again stated that he wouldn't answer any  
11 questions. (Tr. 8:15-20.) Jimenez then asked where Mr. Topete was found that day. Eventually,  
12 he began asking about why Mr. Topete ran, to which Mr. Topete once again replied that he  
13 wasn't going to answer any questions. (Tr. 9:14-15.) Jimenez then began asking about Mr.  
14 Topete's tattoos.

15 Mr. Topete answered the basic questions, but when Jimenez again started asking for  
16 details regarding the incident, Mr. Topete refused to answer and stated that he was more  
17 concerned about his daughter than anything. (Tr. 11:11-13.) Jimenez continued his line of  
18 questioning until Mr. Topete asked what he was being charged with. (Tr. 13:4.) A heated  
19 exchange took place where Mr. Topete requested to know what he was being charged with and  
20 Jimenez avoided the questions and asked for more details about the incident. (Tr. 13:4-20; 14:1-  
21 21; 15:1-5; 16:8-9.) After Mr. Topete reminded him he didn't have to answer any question,  
22 Jimenez stated, "Want to talk about your daughter... we can talk about - where'd you grow up?"  
23 (Tr. 15:2-10.) Mr. Topete answered some basic questions. Eventually Jimenez said that he would  
24 find out where Mr. Topete's daughter was and left the room. (Tr. 15:16.)

---

25  
26  
27  
28 <sup>1</sup> The defense will provide a copy of the transcript to the court upon stipulation entered into by the prosecution or in  
evidence at the hearing.

1 When Jimenez returned he said that the baby was with CPS and started to question Mr.  
2 Topete about the timeline of the previous evening. (Tr. 15:21, 16:1-7.) Mr. Topete answered  
3 questions about meeting up with Angelique Topete, his wife and mother of his child. (Tr. 16:9-  
4 21; 17:1-21; 18:1-18.) Eventually, Mr. Topete asked "So what about the baby?" (Tr. 18:18.)  
5 Jimenez reassured him the baby was with CPS and that she would be returned to the mother once  
6 Angelique was determined to be fit. Mr. Topete reassured him that Angelique had not abandoned  
7 the baby. (Tr. 18:20-21; 19:1-21.) Jimenez eventually began asking about when the baby had  
8 been abandoned, once again turning to the incidents surrounding Mr. Topete's flight from law  
9 enforcement the night before. (Tr. 20:1-3.) Mr. Topete listened, only responded to questions  
10 establishing Angelique's fitness as a parent, and eventually stated "You're asking me to answer  
11 you again. I told you I'm not gonna answer." (Tr. 23:10-11.) Jimenez continued his questioning  
12 regarding the night before and asked if Mr. Topete saw the deputy's face. (Tr. 24:6-10.) Mr.  
13 Topete stated that he wasn't going to answer any questions two more times; the second time he  
14 said he was focusing on the baby. (Tr. 24:11, 21.)

15 Jimenez then started to discuss that his opinion may have an impact on whether CPS  
16 released the baby to Angelique or not and resumed questioning regarding the incident. (Tr. 25:5-  
17 15.) He explained that the incidents of the previous night were connected to what opinion he  
18 would give CPS. (Tr. 25:14-15.) Mr. Topete questioned why the two were connected and  
19 Jimenez continued asking questions about the night before and discussing whether Angelique  
20 was a fit mother. Mr. Topete then stated "we're done man, if we're gonna be playing these  
21 games then we're done." (Tr. 26:12.)

22 Mr. Topete started to realize that Jimenez was attempting to leverage his influence in  
23 getting the baby released to Angelique in exchange for Mr. Topete answering questions about the  
24 incident. He finally asked, "what's my wife gotta do with that? How's she in this thing?"  
25 Jimenez angrily replied, "You fuckin' think about that" and left the room. (Tr. 27:1-2.)

26 Then Parole Agent Modesto entered and spent a significant amount of time establishing a  
27 level of trust with Mr. Topete, discussing their past and that Modesto has always been straight  
28 forward and never lied to him. Eventually Modesto said, "I need the rifle, give me the fucking

1 rifle." (Tr. 29:2.) Mr. Topete replied, "I need my baby to be with her mother." (Tr. 30:5.)  
2 Modesto started to bargain with him, offering to get Jimenez to help with CPS if Mr. Topete  
3 would tell him where the rifle is. Mr. Topete asked for something in writing. (Tr. 31:6.) At one  
4 point Topete asked, "how long is she gonna be in CPS" to which Modesto replied "As long as that  
5 weapon's out there." (Tr. 31:17-18.) Mr. Topete then asked to talk to his wife. They went back  
6 and forth regarding Modesto wanting to know where the rifle was in exchange for helping  
7 Angelique get custody of the baby. Mr. Topete finally said, "Let me just talk to her and  
8 everything else falls to where everyone's happy once I talk to her." (Tr. 34:14-15.) Modesto then  
9 left the room.

10 Eventually, Modesto returned with Jimenez and they started to draft a document  
11 regarding Jimenez's support for Angelique getting custody of the daughter. Modesto asked Mr.  
12 Topete to sign the document, but Mr. Topete queried why it mattered if he signed it. (Tr. 35:20.)  
13 Then he asked where Jimenez's signature is. Modesto assured him it would be signed in front of  
14 him. (Tr. 36:7.) Jimenez then said, "I'm not signing this piece of paper so you [Topete] can turn  
15 around and not tell me shit." (Tr. 37:11-12.)

16 No final word was yet received from CPS and they were not able to reach Angelique on  
17 the phone, so there was some argument over when the baby would be returned to Angelique and  
18 whether Mr. Topete was going to tell them anything or "go back on his word." Jimenez stated a  
19 number of times that he wouldn't tell CPS to give the baby back to Angelique until Mr. Topete  
20 "gave him something." (Tr. 42:17; 47:3.) Mr. Topete then admitted he was drinking, and that  
21 was why he ran the night before. (Tr. 51:15.) Jimenez asked how many rounds he thinks he  
22 fired, but Mr. Topete didn't respond. The officers continued to ask how many rounds were fired.  
23 Eventually Mr. Topete said, with regard to providing information in return for advising CPS to  
24 return the baby to his wife, "there's nothing guaranteed." (Tr. 53:1.)

25 Jimenez became agitated and said, "I'm done" and walked out of the interview room. (Tr.  
26 53:20.) Mr. Topete then asked to be taken to his cell because Jimenez "walked out on the CPS  
27 thing." (Tr. 54:20.) Modesto continued his effort to get Mr. Topete to answer questions and to  
28 trust that Jimenez and Modesto would keep their word. Mr. Topete asked two more times to be

1 taken to his cell. (Tr. 55:7, 13.) Modesto started urging him repeatedly to tell him how many  
2 times he fired the rifle, Mr. Topete didn't respond, except to ask to talk to Angelique and to say  
3 that he wouldn't say anything else until he did get the opportunity to talk to her. (Tr. 56:7-8.)  
4 Modesto started to talk about the need for Mr. Topete to trust that they would provide a  
5 recommendation to CPS and to offer up some information in return. Mr. Topete wouldn't answer  
6 any questions and Modesto eventually left the room.

7 Cordova then entered the interrogation room and he and Mr. Topete went back and forth  
8 about the baby and CPS and how long it would be until Angelique could be reunited with the  
9 baby. Cordova eventually asked, "Where did you see the officer at?" This time Mr. Topete  
10 replied, "At Pilot." (Tr. 72:7-8.) Mr. Topete once again asked about Angelique and whether CPS  
11 was going to release the baby to her. Cordova then asked about the location of the rifle. Mr.  
12 Topete said nothing in response.

13 Later, at page 77 of the transcript, the following colloquy takes place:

14 Cordova Yeah. But you got a chance to make it right man. You feel bad about what  
15 happened last night? You sit here with me, we been talking, you can trust  
16 me, you know that. You got a chance to make it right, bro. That's all I'm  
17 asking from you, is to please help us make it right. Before something bad  
18 happens. We'll work for you dude, you know that. We already have. So  
19 please help us get that thing off the street. Don't let it get in the hands of  
20 somebody that's gonna hurt themselves. A kid or something man. It's my  
21 worst fucking nightmare. I've seen it happen already. It's not cool man.  
22 Topete I just need to talk to her before anything.

23 Cordova The clock's tickin' Marco. If she doesn't call us back now, I don't know  
24 what to tell you. I can only do what I can do with that. I'll do everything I  
25 can. We been working for you man.

26 Topete I know.

27 Cordova I know you need to talk to your lady. I know that's on top of your priority  
28 list. I need to get a rifle off the street. That's the top of my priority list right  
now. We both have things that we need. And I'm willing to meet you in the  
middle if you're willing to meet me there. Will you at least tell me if its  
close to where they found you. Without giving me anything else, is it close  
to where they found you man? (No response.) That at least gives us a  
starting point. It's something? (No response.) Not gonna give it up man?  
Been a long night, I know. You think you're willing to do that for me? (No  
response.) Stay with me Marco. Did you hear what I said?

29 Topete Huh?

30 Cordova You hear what I said?

31 Topete What?

1 Cordova I asked you just to give us if it was close to where you were at. Without  
2 giving anything else, just tell us if it's close to where you were at, so we can  
3 start looking for it. Please. And I'll go try to call your lady.  
4 Topete (No response.) Where's my lawyer, by the way?  
5 Cordova I'm not sure.  
6 Topete Did they already assign one to me?  
7 Cordova I don't think so.  
8 Topete No?  
9 Cordova They will.

10 (Tr. 77:2-21; 78:1-16.)

11 Eventually Cordova asked if Mr. Topete was trying to say that he wasn't going to answer  
12 any of his questions before he spoke to Angelique. Mr. Topete affirmed that he wouldn't answer  
13 any questions. (Tr. 81:4-7.) Cordova left the room.

14 Jimenez then entered and discussed the effect of Deputy Diaz's death on his family at  
15 length. Mr. Topete didn't respond. Eventually Jimenez stated "You fucking make me sick" and  
16 left the room. (Tr. 85:9-11.) Cordova continued the questioning. Mr. Topete eventually said,  
17 "I'm done." (Tr. 92:12.) Cordova then went on a long rant about the rifle and where it was. At  
18 2:20 p.m., Mr. Topete asked for ten minutes by himself. (Tr. 95:7.) At 2:30 p.m. Cordova and  
19 Jimenez returned and Mr. Topete started to talk about the incident. He answered their questions  
20 about why he ran and what he could remember of the night before. Later, Jimenez received a  
21 phone call from a woman at CPS and put her on speakerphone to talk to Mr. Topete. She stated  
22 that the baby would be returned to Angelique at 4:30 p.m. that day. (Tr. 117:1-10.) After the  
23 officers were done questioning him, Mr. Topete asked to be brought to his cell. (Tr. 129:4.) The  
24 interrogation ended at 3:20 p.m., six hours after questioning began.

## 25 MEMORANDUM OF POINTS AND AUTHORITIES

### 26 I.

### 27 LAW

28 Defendant Topete's motion to exclude the statements he made to Detective Ray Jimenez,  
Parole Officer Joe Modesto, and Detective Ron Cordova on June 8, 2008, should be granted  
because the interrogation continued after Mr. Topete unambiguously asserted his right to remain  
silent at least six times while talking to law enforcement; and later asserted his right to have an  
attorney present. However, instead of ceasing interrogation, once Jimenez and Modesto



1 determined that Mr. Topete's concerns were for his child, they leveraged that concern to compel  
2 further responses. Detective Jimenez, Parole Officer Modesto, and eventually Detective Cordova  
3 all continued to question Mr. Topete in violation of his rights during an in-custody interrogation  
4 as established by *Miranda v. Arizona* (1966) 384 U.S. 436, and its progeny.

5 ***A. Miranda Advisement: Law Enforcement Duty to Scrupulously Honor Invocations***  
6 ***Of Fifth Amendment Rights***

7 The principle holding in *Miranda v. Arizona* (1966) 384 US 436, that police interrogation  
8 must cease when the person in custody indicates that he wishes to remain silent, has become a  
9 foundational legal principle, although its progeny has attempted to define its contours and carve  
10 out exceptions.

11 In *Michigan v. Mosley* (1975) 423 U.S. 96, it was held that after a person in custody  
12 invoked their right to remain silent, police were required to "scrupulously honor" that invocation  
13 and to cease questioning immediately. However, police were permitted to, after passage of a  
14 "significant" period of time, re-advise the suspect and inquire as to other suspected criminal  
15 activity, unrelated to the first suspected crime, should the person choose to waive their right to  
16 remain silent in the subsequent interview. (*Id.* at 105-06.) The analysis in that case was to  
17 consider the totality of the circumstances in determining whether a waiver occurred or not.

18 In *Edwards v. Arizona* (1981) 451 U.S. 477, the Supreme Court first considered the effect  
19 of invoking the right to counsel, rather than the right to remain silent. In *Edwards*, the Court  
20 adopted a bright line rule proscribing further questioning after a suspect invokes the right to  
21 counsel, rather than the *Mosley* "totality of the circumstances" analysis. (*Id.* at 484-85; see also  
22 *Montejo v. Louisiana* (2009) 129 S. Ct. 2078, 2086.)

23 ***B. Davis: Fifth Amendment Right to Remain Silent and to Counsel Must be Invoked***  
24 ***Unambiguously***

25 In *Davis v. United States* (1994) 512 U.S. 452, 462, the Supreme Court addressed the  
26 contours of the mandate to cease interrogation as announced in *Miranda* and *Edwards*. The  
27 Court held that the police could continue questioning a suspect in situations where a suspect's  
28 invocation of his right to counsel was ambiguous. (*Ibid.*) The court held that once a suspect

1 knowingly and voluntarily waives his Miranda rights, law enforcement officers may continue to  
2 question him unless he clearly and unequivocally requests an attorney in subsequent questioning.  
3 "But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a  
4 reasonable officer in light of the circumstances would have understood only that the suspect  
5 might be invoking the right to counsel, our precedents do not require the cessation of questioning  
6 .... Rather the suspect must unambiguously request counsel."(*Davis, supra*, 512 U.S. at 459.) The  
7 test for determining whether the request is ambiguous is an objective one. "Although a suspect  
8 need not speak with the discrimination of an Oxford don, ... he must articulate his desire to have  
9 counsel present sufficiently clearly that a reasonable police officer in the circumstances would  
10 understand the statement to be a request for an attorney." (*Id.* at 459.) However, the court in  
11 *Davis* did not provide any significant guidelines for determining when a statement should be  
12 deemed unequivocal.

13 The Supreme Court has not yet directly addressed ambiguous statements in the context  
14 of the right to remain silent. Since the Court's decision in *Davis*, many state and federal courts  
15 have extended its rule and required suspects to unambiguously invoke the right to remain silent  
16 before police must halt an interrogation. (*United States v. Banks* (7<sup>th</sup> Cir. 1996) 78 F.3d 1190,  
17 1197-98, *vacated*, *Mills v. United States* (1996) 519 U.S. 990, *on remand*, (7<sup>th</sup> Cir. 1997) 122  
18 F.3d 346, 350-51; *Medina v. Singletary* (11<sup>th</sup> Cir. 1995) 59 F.3d 1095, 1100-01; *United States v.*  
19 *Johnson* (8<sup>th</sup> Cir. 1995) 56 F.3d 947, 955; *People v. Stitely* (2005) 35 Cal. 4th 514, 535; *State v.*  
20 *Payne* (Idaho 2008) 199 P.3d 123, 133-34; *State v. Walker* (Wash. Ct. App. 2005) 118 P.3d 935,  
21 943-44.)

22 The Ninth Circuit Court of Appeals took on this issue in *Deweaver v. Runnels* (9<sup>th</sup> Cir.  
23 2009) 556 F.3d 995, 1001. In that case it was held that:

24 "This court has several times declined to decide whether the *Davis*  
25 requirement of a clear and unequivocal invocation applies to the right to  
26 remain silent. See *United States v. Rodriguez* (9<sup>th</sup> Cir. 2008) 518 F.3d 1072,  
27 1078 n.5 [avoiding addressing the issue and noting that this court had so  
28 demurred in four prior cases]. We similarly decline to do so here. The  
question before us is not whether the *Davis* rule applies to an invocation of  
the right to remain silent, but whether the state appellate court contravened  
Supreme Court precedent by applying it in that manner. See *Williams v.*  
*Taylor* (2000) 529 U.S. 362, 405-06.

1 In similar circumstances, the First Circuit, which has also withheld  
2 judgment regarding the application of *Davis* to the invocation of the right  
3 to remain silent, held that it could not "deem unreasonable a conclusion by  
4 the [state] courts . . . that [was] consistent with the approach taken by so  
5 many respected tribunals." *James v. Marshall* (1<sup>st</sup> Cir. 2003) 322 F.3d 103,  
6 108 (quoting *Bui v. DiPaolo* (1<sup>st</sup> Cir. 1999) 170 F.3d 232, 239). We,  
7 likewise, could not conclude that application of the *Davis* rule to an  
8 invocation of the right to remain silent is contrary to or an unreasonable  
9 application of Supreme Court precedent where the Supreme Court has  
10 neither "squarely addresse[d]" when an ambiguous statement amounts to an  
11 invocation of the right to remain silent nor refused to extend the *Davis* rule  
12 to an invocation of the right to remain silent. *Wright v. Van Patten* (2008)  
13 552 U.S. 120.

14 Although Article 1, Section 28, subdivision (d), of the California Constitution states that  
15 California courts are to apply federal standards to *Miranda* issues, it appears there is no federal  
16 standard yet established for the applicability of *Davis* to the right to remain silent. Therefore,  
17 California state law governs the applicability of the *Davis* ambiguity analysis. The California  
18 Supreme Court has decided the issue and held that a *Davis* analysis does apply in cases of  
19 ambiguous assertions of the right to remain silent. (See *People v. Stitely*, *supra*, 35 Cal. 4th at  
20 535.)

21 ***C. The Defendant May Selectively Waive His Right to Remain Silent: Answering***  
22 ***Questions Regarding One Subject Does Not Waive His Right Not to be Questioned on***  
23 ***Another Subject***

24 The courts have permitted further interrogation regarding a different offense where a  
25 significant period time elapses between interrogations and new *Miranda* warnings are issued. In  
26 *Mosley*, the defendant was advised of his rights and then stated that he did not want to talk about  
27 the offense. The police then "immediately ceased the interrogation, resumed questioning only  
28 after the passage of a significant period of time and the provision of a fresh set of warnings, and  
restricted the second interrogation to a crime that had not been the subject of the earlier  
interrogation." (*Id.*, at 105-06.) The Court held that immediately ceasing all questioning and  
resuming only after a significant period of time had passed and new warnings were given was  
sufficient and the second interrogation was admissible.

1 In *United States v. Lopez-Diaz* (1980) 630 F.2d 661, the Ninth Circuit Court relied on this  
2 principle laid out in *Mosley* in its determination to exclude a defendant's statement where his  
3 right to remain silent was not "scrupulously honored." In that case, Lopez-Diaz received his  
4 *Miranda* warnings and stated that he would not discuss the drugs that had been found in his van  
5 but that he would "be willing to provide other information." (*Lopez-Diaz, supra*, 930 F.2d at  
6 664.) After a "short conversation" Lopez-Diaz was asked about the drugs in the van. The Court  
7 held that the statement should be excluded, focusing on the fact that the question was on the  
8 "very subject Lopez-Diaz had said he did not wish to discuss" and that no "significant period of  
9 time had elapsed." (*Id.*, at 664.)

10 The Court emphasized that "[t]here is a critical distinction between, on the one hand, an  
11 inquiry for the limited purpose of clarifying whether the defendant is invoking his right to remain  
12 silent or has changed his mind regarding an earlier assertion of the right and, on the other hand,  
13 questioning aimed at eliciting incriminating statements concerning the very subject on which the  
14 defendant has invoked his right." (*Id.*, at 665; see also *United States v. Davis* (9<sup>th</sup> Cir. 1975) 527  
15 F.2d 1110, 1111, *cert. denied* (1976) 425 U.S. 953 [admitting a confession where the defendant  
16 was asked if he wanted to reconsider his decision to remain silent in light of photographic  
17 evidence and questioning continued after the defendant signed a waiver and voluntarily agreed to  
18 talk].)

19 Although waiver may be inferred from the actions and words of the person interrogated,  
20 "(t)he courts must presume that a defendant did not waive his rights; the prosecution's burden is  
21 great." (*Lopez-Diaz, supra*, 930 F.2d at 665, citing *North Carolina v. Butler* (1979) 441 U.S.  
22 369, 373.) Additionally, an implied waiver may only apply to a specific subject. For example,  
23 the *Lopez-Diaz* court held that even if the defendant "led the conversation into the area" doing so  
24 "did not implicitly waive his previously asserted right to remain silent regarding the drugs in the  
25 van." (*Lopez-Diaz, supra*, 930 F.2d at 665; see also *United States v. Soliz* (9<sup>th</sup> Cir. 1997) 129  
26 F.2d 499 [reversing, in part, and remanding as a result of the erroneous admission of  
27 incriminating statements made after a "selective waiver" of *Miranda* rights].) In other words,  
28 there may be a selective waiver as to certain subjects, but law enforcement must scrupulously

1 honor the defendant's right not to be questioned on other topics once the right to remain silent  
2 has been unambiguously invoked.

3 ***D. Any Statement Made as a Result Of Using Impermissible Tactics Such as "Last***  
4 ***Chance" Statements, Threats or Promises is a Coerced Confession***

5 Under the due process clause of the Fourteenth Amendment, and article I, sections 7 and  
6 15, of the California Constitution, an involuntary confession is inadmissible. An involuntary  
7 confession is one extracted by threats or violence or obtained by any direct or implied promise,  
8 however slight. (*People v. Benson* (1990) 52 Cal. 3d 754, 778.) "[A]ny promise made by an  
9 officer . . ., express or implied, of leniency or advantage to the accused, if it is a *motivating cause*  
10 of the confession, is sufficient to invalidate the confession . . . ." (*People v. Ray* (1996) 13 Cal.  
11 4th 313, 339, italics added, citations omitted.)

12 *Edwards* also articulated a second set of prophylactic rules to protect the defendant from  
13 attempts by law enforcement to coerce a statement. After receiving *Miranda* warnings, if a  
14 suspect in custody invokes his right to remain silent, only the suspect may initiate "further  
15 communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451  
16 U.S. 477, 485.) Even if a suspect does reinitiate contact with the police, it is the prosecution's  
17 burden to show the suspect waived his Fifth Amendment right during the subsequent  
18 interrogation. (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044.) This rule is "designed to  
19 prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."  
20 (*Michigan v. Harvey* (1990) 494 U.S. 344, 350.)

21 Likewise, in *United States v. Barnes* (9<sup>th</sup> Cir. 1970) 432 F.2d 89, the Court excluded a  
22 confession where the defendants asserted their right to remain silent and refused to sign any  
23 waiver of their rights. Nonetheless, the questioning continued and the defendants were shown a  
24 confession of an accomplice. The Court held that the questioning, conducted "for the obvious  
25 purpose of getting defendants to abandon their self-imposed silence" was "in flagrant violation  
26 of the rule as set forth in *Miranda*." (*Barnes*, 432 F.2d at 91.)

27 The standard establishing when questioning is intended to get a defendant to "abandon  
28 his self-imposed silence" is somewhat similar to that which determines when questioning is

1 interrogation. The United States Supreme Court, in *Rhode Island v. Innis* (1980) 446 US 291, set  
2 out the standard as to what "interrogation" meant in *Miranda* scenarios:

3 The concern of the Court in *Miranda* was that the "interrogation environment"  
4 created by the interplay of interrogation and custody would "subjugate the  
5 individual to the will of his examiner" and thereby undermine the privilege against  
6 compulsory self-incrimination. *Id.*, at 457-458. The police practices that evoked  
7 this concern included several that did not involve express questioning... (*Innis*,  
8 *supra*, at 299) ...[but] its functional equivalent. That is to say, the term  
9 "interrogation" under *Miranda* refers not only to express questioning, but also to  
10 any words or actions on the part of the police (other than those normally attendant  
11 to arrest and custody) that the police should know are reasonably likely to elicit an  
12 incriminating response from the suspect. ...A practice that the police should know is  
13 reasonably likely to evoke an incriminating response from a suspect thus amounts  
14 to interrogation. (*Id.*, at 301) .... But, since the police surely cannot be held  
15 accountable for the unforeseeable results of their words or actions, the definition of  
16 interrogation can extend only to words or actions on the part of police officers that  
17 they *should have known* were reasonably likely to elicit an incriminating response.  
18 (*Id.*, at 302)

19 In this regard, "last chance" comments by police officers have been held to be the type of  
20 statements which would be reasonably likely to illicit an incriminating response from a suspect.

21 In *United States v. Padilla* (9<sup>th</sup> Cir. 2004) 387 F 3<sup>rd</sup> 1087, 1093 the Court stated that:

22 Agent Garriola's "last chance to cooperate" statement constituted interrogation  
23 because the agent should have known that it was reasonably likely that such a  
24 comment would evoke an incriminating response. It is difficult to imagine any  
25 purpose for such a statement other than to elicit a response. The fact that Agent  
26 Garriola was seeking a response with regard to a separate investigation does not  
27 alter our conclusion. The "last chance" of which Padilla had been advised was the  
28 last chance for a possible bargain over Padilla's federal charges, and a response  
related to those charges was a natural result of the question. The question was  
"reasonably likely to evoke an incriminating response." (*Id.* at 302 n.7; see *United*  
*States v. Brown* (9<sup>th</sup> Cir. 1983) 720 F.2d 1059, 1068 ["It is almost axiomatic in  
criminal investigation that if a suspect is induced to talk at all, he is likely to hurt  
his case."]). We conclude, therefore, that Padilla's statement resulted from custodial  
interrogation and should have been excluded.

29 The functional equivalent of interrogation was also discussed in *People v. Sims* (1993) 5  
30 Cal.4th 405, 440. In that case, the defendant, who was arrested in Nevada for the murder of a  
31 pizza delivery person in California, invoked his *Miranda* rights. Thereafter, as the officers were  
32 preparing to leave the jailhouse interview room, the defendant asked them about being extradited  
33 to California or to South Carolina, where he was wanted for additional crimes. During that

1 conversation, a police officer from California described the crime scene--a motel room--and  
2 suggested that the defendant had occupied that room and had lured the victim inside when he  
3 arrived to deliver a pizza. The Court concluded that those statements by the officer were the  
4 "functional equivalent" of interrogation because they indirectly accused the defendant of the  
5 crime and thus were likely to induce him to incriminate himself. (*Ibid.*)

6 Therefore, once a defendant has unambiguously invoked either his right to remain silent  
7 or his right to have an attorney present, questioning must immediately cease. That includes any  
8 last chance statements or descriptions of what the police believe to have occurred. The only  
9 occasions where questioning may continue is where a significant break from questioning occurs,  
10 the defendant initiates further questioning, the defendant waives his right to remain silent or to  
11 have an attorney present, and the questions are limited in subject matter in situations where the  
12 defendant has made a selective waiver,

## 13 II.

### 14 **THE MIRANDA ADVISEMENT WAS DEFECTIVE BECAUSE THE** 15 **DEFENDANT DID NOT EXPLICITLY OR IMPLICITLY WAIVE HIS RIGHTS** 16 **TO REMAIN SILENT AND TO COUNSEL UNDER THE FIFTH AMENDMENT**

17 In this case, Mr. Topete was advised of his rights and indicated that he understood them.  
18 He did not waive them. Instead, Mr. Topete, after the advisement, clearly stated at least six times  
19 in first half hour of questioning that he did not wish to answer any questions. He also requested  
20 an attorney. Although the responses by the law enforcement officers clearly indicated that they  
21 understood his invocations, all three of the officers ignored them. Instead, they engaged in  
22 manipulative tactics, issuing threats and promises to coerce Mr. Topete to answer questions  
outside the presence of an attorney.

#### 23 ***A. The Defendant Repeatedly Exercised His Right to Remain Silent, Which was*** 24 ***Ignored by the Officers***

25 1. Mr. Topete's first unambiguous statement that he wished to remain silent appears on  
26 page 4 of the transcript, which was acknowledged but ignored by Jimenez:

27 Topete When? Last night.

Jimenez Tell me what happened.

28 Topete \*\*\*\*\* I know you're going to ask questions. No disrespect, not to be rude or  
nothing, but I'm just can't answer no questions.

1 Jimenez You won't tell me nothing man, come on? How old are you?

2 (Tr. 4:14-18.)

3 2. Mr. Topete asserted his right to remain silent a second time after Jimenez began asking  
4 him about the previous night:

5 Jimenez So at some point when you were going home or wherever you were going,  
6 obviously you ran into the law? Did they try to stop you?

7 Topete Yeah, **I can't answer no more, you know, questions like that.**

8 Jimenez I'm just asking –

9 Topete I know you're doing your job, man. You need answers. But **I'm not gonna  
10 give you those answers.**

11 Jimenez Well you tell me what you want to tell me.

12 Topete I already told you the simple things, what I was doing yesterday, **and that  
13 was it.**

14 (Tr. 8:15-21, 9:1-3.)

15 3. He asserted his right a third time on page 9, which was completely ignored by Jimenez:

16 Jimenez So why'd you go in there?

17 Topete Like I said, **no questions.**

18 Jimenez How many tattoos you got?

19 (Tr. 9:14-16.)

20 4. Topete answered these general questions, but refused to answer questions about the  
21 night before; asserting his right to remain silent for a fourth time. Jimenez began switching  
22 topics, trying to find something Mr. Topete would talk about:

23 Topete No I don't. I just know you're telling me things, but what are my actual  
24 charges? What Penal Code? What am I being charged for? That's all I want  
25 to know. Just tell me. **I could just clam up and not say anything,** you  
26 know.

27 Jimenez I know that. Like you said, we can talk just about anything. Want to talk  
28 about your daughter. We can talk about—where'd you grow up?

29 Topete All I'm asking, is just tell me what my Penal Code charges are, and that's it.  
30 Just tell me.

31 Jimenez Let me ask you this, where did you grow up?

32 Topete Where did I grow up? I grew up right here.

33 (Tr. 15:2-11.)

34 5. When Jimenez started going over the events of the night before, Mr. Topete asserted  
35 his right to remain silent a fifth time:



1 Topete No, I'm just gonna listen. You can just keep going, you know.  
2 Jimenez So you take off, leave the baby there with the cop. Where did you go from there?  
3 Topete **You're asking me to answer you again. I told you I'm not gonna answer**  
4 **man.** Deal with this, you know, another time. I'm just worried about my  
5 baby right now, that's all.  
6 Jimenez Okay  
7 Topete Just get her back to her mother. It's that simple, you know.  
8 Jimenez When you were out there hiding dude, you saw the helicopters all over, right.  
9 Because everybody and their mother saw the helicopters all over. You heard  
10 the helicopters. They were talking on their PA system, didn't you? You hear  
11 normal, right? You're not deaf? Tell me you can hear them?

9 (Tr. 23:7-19.)

10 6. Mr. Topete continued to assert his right to remain silent, for a sixth time, which was  
11 once again ignored by Jimenez:

12 Topete **\*\*\*\* more questions.**  
13 Jimenez Not saying did you break the law, I'm just asking, did you see the cop? Did  
14 he talk to you through the window at the gas station in Dunnigan? The  
15 cameras show that you were talking to him. Did you see his face? [Topete is  
16 not answering—just staying silent.] Just answer me that that one question, did  
17 you see his face?  
18 Topete (No answer.)  
19 Jimenez Marco, did you see his face?  
20 Topete (No answer.)  
21 Jimenez You're not going to answer that question for me?  
22 Topete **I'm not answering no more questions.** I just want to focus on the  
23 baby.  
24 Jimenez I kept my end of the deal. I told you the baby is fine.

21 (Tr. 24:11-21; 25:1.)

22 7. Then Jimenez started attempting to barter his recommendation to CPS that the baby be  
23 returned to Angelique in exchange for Mr. Topete waiving his right to remain silent. Once Mr.  
24 Topete realized this was the goal, he once again invoked his right to remain silent, for the  
25 seventh time:

26 Topete **All right, we're done man.** If we're gonna be playing these games, then  
27 **we're done.**  
28 Jimenez What did I tell you was the game? I'm not –  
Topete I know what you're trying to do Homes, **we're done man.**  
Jimenez What am I trying to do?

1 Topete **We're done. We're done.** I already see what you're doing.  
2 Jimenez I'll tell you what I'm gonna do.  
3 Topete It's fucked up. **You want to use the baby.**  
4 Jimenez I'm not using the baby. I don't drive around in a fucking car with that baby  
in the backseat. You did. Don't pull that shit on me.

5 (Tr. 26:12-21.)

6 8. After both Jimenez and Modesto attempted to negotiate the return of his daughter to  
7 his wife, Mr. Topete eventually asked to be returned to his cell. This request was similarly  
8 ignored:

9 Modesto One, two, three, four, five, six, what? How many? Four? Five? One?  
10 Come on man, time's running out. Talk to me man. Well? You know you  
want to get t off your chest. How many rounds?

11 Topete **Just take me to my cell.** He walked out on the CPS thing.

12 Modesto No he didn't. I can bring him back. How many? How many?

13 (Tr. 54:17-21.)

14 9. Mr. Topete only responded to Modesto's questions about the previous night by asking  
15 to be brought to his cell:

16 Topete Tell him **I just want to go to my cell.**

17 Modesto So you want to throw this away? I'll bring him in with the paper. You tell  
18 him. And he'll make the call, right now. Time's running out. I bring him in  
with the paper. You tell him. How many rounds? In your head? Deal? Do  
19 we have a deal? I'll bring him in right now Marcos. With the paper. Do we  
have a deal?

20 Topete **I just want to go to my cell.** I didn't even get to talk to Angelique or  
nothing.

21 Modesto Well I showed you—we got the phone. The call has been made. You want—  
22 you—

23 (Tr. 54:7-16.)

24 9. Finally, Mr. Topete understood that his daughter would likely stay with CPS unless he  
25 cooperated. He continued to insist that he talk to his wife before he would say anything:

26 Topete I'm telling you man, **I'm not saying nothing 'til I talk to Angelique.** And  
that's all I been asking.

27 Modesto You saw why. I gave you my word we made the call to the mom. The mom  
28 knows where she's at. That's why we were gonna connect you through the  
phone. But we need, we need, we need for you to say something to us. You  
know, I've more than produced for you.

1 (Tr. 56:7-12.)

2 10. Mr. Topete unequivocally stated again that he wasn't going to answer questions  
3 unless he got to speak with his wife. Cordova gave him the "last chance" speech:

4 Cordova You're not gonna break my heart by saying, "**Hey I'm not talking to you**  
5 **guys right now. I want to talk to my lady first.**" **That's where you're at?**  
6 Topete Totally. I just want to talk to her. **That's all I been saying.**  
7 Cordova You're not gonna speak on anything until—  
8 Topete Until I talk to her. You guys think I'm trying to dodge you guys. I made it  
9 clear, and you guys made it clear to me too. So we're just waiting.  
10 Cordova **We can't wait forever Marco, you know that. We can't sit here and wait**  
11 **for you for 3, 4 days, or whatever it may take.**

12 (Tr. 81:4-13.)

13 11. Mr. Topete eventually tried, one last time, to end the interrogation:

14 Topete I'm sitting here thinking about my life. How it affected people and how it's  
15 affected me over the years. Wish I could start my life all over again. \*\*\*\* I  
16 don't know what to think; I don't know what to say anymore. **I'm done.**  
17 **My body is done. My mind is done.**

18 (Tr. 92:9-12.)

19 Detective Jimenez, Parole Agent Modesto, and Detective Cordova all violated Mr.  
20 Topete's rights as established by the court in *Mosley* by failing to "scrupulously honor" his  
21 invocation of his right to remain silent. Although they could have re-advised Mr. Topete of his  
22 rights and inquired as to other suspected criminal activity after a significant period of time had  
23 passed, that is not what occurred here. In this case, no time elapsed, no re-advisement took place,  
24 and the questioning remained focused on the same suspected crime.

25 Regarding invocations of the right to remain silent, *Stitely* requires that the statements be  
26 unambiguous. In this case, Mr. Topete unambiguously asserted his right to remain silent at least  
27 six times, if not as many as eleven. Each time Mr. Topete asserted his right to remain silent, the  
28 officers clearly understood that he didn't want to answer questions. Their failure to honor the  
requests was not due to ambiguity, but rather was an attempt to find a line of questioning that  
would compel Mr. Topete to answer.

1 Although *Edwards* allows the suspect to initiate "further communication, exchanges, or  
2 conversations with the police," this was not the case here. The three officers continued to apply  
3 constant pressure and manipulation to compel Mr. Topete to answer questions. It is the  
4 prosecution's burden to show the suspect waived his or her Fifth Amendment right during the  
5 subsequent interrogation once the right to remain silent has been invoked. (*Oregon v. Bradshaw*  
6 (1983) 462 U.S. 1039, 1044.) This rule is "designed to prevent police from badgering a  
7 defendant into waiving his previously asserted *Miranda* rights" (*Michigan v. Harvey* (1990) 494  
8 U.S. 344, 350); exactly the sort of "badgering" that occurred here.

9 Mr. Topete did answer "simple" questions, but that did not amount to a waiver of his  
10 previously invoked right to remain silent. *Mosely* allowed continued questioning "after the  
11 passage of a significant period of time and the provision of a fresh set of warnings, and restricted  
12 the second interrogation to a crime that had not been the subject of the earlier interrogation."  
13 (*Id.*, at 105-06.) The Ninth Circuit court agreed with the *Mosley* analysis in *Lopez-Diaz*,  
14 requiring that the statement be excluded, based on the fact that questions were on the "very  
15 subject Lopez-Diaz had said he did not wish to discuss" and were asked without any "significant  
16 period of time" having passed between questioning. (*Id.*, at 664.) Even *United States v. Davis*  
17 required a signed waiver to admit a confession where the defendant was asked if he wanted to  
18 reconsider his decision to remain silent in light of photographic evidence.

19 No such passage of time, no new warnings, and no signed waiver occurred in this case.  
20 Instead, all of the questioning officers spent the six hour period constantly questioning Mr.  
21 Topete and working to find a way to badger him into answering questions. His willingness to  
22 answer questions about his whereabouts earlier in the day and about the fact that Angelique did  
23 not abandon the baby did nothing to waive his right not to be questioned about the incidents  
24 surrounding his flight from law enforcement. At best, that willingness might function as an  
25 implied waiver, but *Lopez-Diaz* clearly permits such a selective waiver. In fact, even if Mr.  
26 Topete "led the conversation into the area," which he did not, doing so would "not implicitly  
27 waive his previously asserted right to remain silent." (*Lopez-Diaz, supra*, 930 F.2d at 665.)  
28

1 Any statements regarding the incident were involuntary insofar as they were obtained by  
2 threats and direct promises. Such conduct is expressly forbidden by *People v. Benson, supra*, 52  
3 Cal. 3d at 778. The officers in this case, like those in *Barnes*, conducted questioning "for the  
4 obvious purpose of getting defendants to abandon their self-imposed silence... in flagrant  
5 violation of the rule as set forth in *Miranda*." (*Barnes*, 432 F.2d at 91.) Their conduct compelled  
6 Mr. Topete to "subjugate the individual to the will of his examiner" and thereby undermined the  
7 privilege against compulsory self-incrimination, as the Supreme Court warned of in *Rhode*  
8 *Island v. Innis*. Even those questions allegedly aimed at returning his daughter to his wife were  
9 intended to elicit an incriminating response from the suspect. It was a clear violation of his right  
10 to remain silent to continue questioning him regarding the previous evening in exchange for  
11 assistance with his daughter.

12 Additionally, the officers engaged in the sort of "last chance" comments forbidden by the  
13 Ninth Circuit Court in *United States v. Padilla*. Cordova and Modesto spent much of the  
14 interrogation telling Mr. Topete he was running out of time to trade answers for Jimenez's  
15 assistance with CPS. Even the officers' descriptions of the events of the previous night constituted  
16 a violation of Mr. Topete's previously invoked right to remain silent as per *Sims*. Such statements  
17 were the "functional equivalent" of interrogation insofar as they indirectly accused Mr. Topete of  
18 the crime and thus were likely to induce him to incriminate himself.

19 ***B. The Defendant Requested Counsel, Which was also Ignored***

20 After many hours of questioning Mr. Topete asked for a lawyer, which was ignored by  
21 Cordova:

22 Topete (No response.) **Where's my lawyer**, by the way?  
23 Cordova I'm not sure.  
24 Topete Did they already assign one to me?  
25 Cordova I don't think so.  
26 Topete No?  
27 Cordova They will.

28 (Tr. 78:11-16.)

29 In addition to invoking his right to remain silent, Mr. Topete also invoked his right to  
30 have an attorney present. *Davis* involved a post-waiver situation, whereas here Mr. Topete never  
31 waived his right and, instead, consistently asserted his *Miranda* rights. He in fact refused to sign

1 any documents. Regardless, if the court finds that *Davis* nonetheless applies, Mr. Topete's  
2 request was unambiguous. The standard is an objective one and requires that "if a suspect makes  
3 a reference to an attorney that is ambiguous or equivocal, in that a reasonable officer in light of  
4 the circumstances would have understood only that the suspect might be invoking the right to  
5 counsel, our precedents do not require the cessation of questioning." (*Davis, supra*, 512 U.S. at  
6 459.) Clearly, Cordova understood that Mr. Topete was invoking his right to counsel, as  
7 evidenced by his reassurances to Mr. Topete that an attorney would be provided. Therefore, as  
8 per *Davis*, "a reasonable police officer in the circumstances" understood the statement. Any  
9 possible ambiguity in that single statement was overwhelmingly compensated for by fact that it  
10 followed repeated and unambiguous invocations of his Fifth Amendment right to remain silent.

### 11 CONCLUSION

12 Mr. Topete unequivocally invoked his right to remain silent at least six times, perhaps as  
13 many as eleven times. He also later invoked his right to counsel. All three of the officers were  
14 present for at least one of the invocations, and none of the three officers backed off from their  
15 questioning for even a moment in response. Mr. Topete did not initiate further questioning, nor  
16 did he ever sign a waiver. Although he answered some questions on other topics, that did nothing  
17 to waive his right to not be questioned regarding the flight from law enforcement and other  
18 events surrounding the incident the night before. The officer's threats and promises to leverage  
19 the safety of his child "for the obvious purpose of getting [him] to abandon [his] self-imposed  
20 silence" was a blatant violation of Mr. Topete's *Miranda* rights. For the foregoing reasons,  
21 defendant urges this court to grant his motion to suppress for all purposes, the entire interview  
22 conducted by Jimenez, Cordova, and Modesto on July 16, 2008.

23 Dated: February 11, 2010

Respectfully submitted,

24 HAYES H. GABLE III  
25 THOMAS A. PURTELL

26 By: 

27 HAYES H. GABLE III  
28 Attorney for the Defendant  
MARCO ANTONIO TOPETE

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the above-entitled action; my business address is 428 J Street, Suite 350, Sacramento, California 95814.

On the date below, I served the following document(s):

**NOTICE OF MOTION AND MOTION TO EXCLUDE  
DEFENDANT'S POST ARREST STATEMENTS**

☐ BY MAIL. I caused such envelope, with postage thereon fully prepaid, to be placed in the United States Mail at Sacramento, California addressed as follows:

☒ BY INTER-OFFICE SERVICE. I caused such document(s) to be delivered by hand to the via inter-office service to the person(s) listed below:

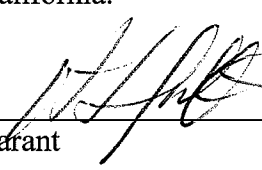
District Attorney of Yolo County

☐ BY FACSIMILE SERVICE. I caused the document(s) to be served via facsimile to the person(s) listed below:

☐ BY EMAIL ATTACHMENT. I caused the document(s) to be served via email as an attachment to the person(s) listed below:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 11, 2010, at Sacramento, California.

  
Declarant